UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENTESAR OSMAN KASHEF, *et al.*,

Plaintiffs,

-against-

BNP PARIBAS S.A., BNP PARIBAS NORTH AMERICA, INC., and DOES 1-10,

Defendants.

Civil No. 1:16-Civ-03228-AJN

Hon. Alison J. Nathan

**REPLY DECLARATION OF TAYEB HASSABO**

I, Tayeb Hassabo, declare the following pursuant to 28 U.S.C. § 1746:

1. I previously submitted a declaration in this matter, dated March 19, 2017 ("Hassabo Decl."), in which I provided my expert opinions concerning matters of Sudanese law that I understood are relevant to Plaintiffs' claims. I now submit this second declaration to respond to the Declaration of Nagi Idris, dated May 22, 2017 ("Idris"), that I understand Plaintiffs have submitted in response to my first declaration.

2. This second declaration is presented in seven parts. Part I responds to Mr. Idris's assertions concerning the sources and interpretation of Sudanese law. Part II responds to Mr. Idris's assertions concerning the causation requirement in Sudanese tort law. Part III responds to Mr. Idris's assertions concerning Sudanese law governing direct and indirect tortfeasors. Part IV responds to Mr. Idris's assertions concerning Sudanese law governing joint tortfeasors. Part V responds to Mr. Idris's assertions concerning provisions of Sudanese law that bar liability for "lawful exercises of right." Part VI responds to Mr. Idris's assertions concerning Plaintiffs' direct liability claims against Defendants ("BNPP"). Finally, Part VII responds to Mr. Idris's assertions concerning the impact of the Sudanese Constitution on Plaintiffs' claims

## Part I – Sources and Interpretation of Sudanese Law

### A. Mr. Idris Incorrectly Describes The Sources And Contents Of Sudanese Law

3. The declaration of Mr. Idris contains numerous incorrect statements about the contents and proper application of Sudanese law. In particular, Mr. Idris fails to apply the correct framework for analyzing Plaintiffs' tort allegations under Sudanese law—whether in the absence or presence of an explicit statute or judicial precedents—and repeatedly cites to statutes that have been explicitly superseded.

4. The extent to which Mr. Idris's declaration mischaracterizes the law of Sudan suggests that it is based on his incomplete research in the abstract, rather than any practical or personal experience and understanding. According to Mr. Idris's own CV, he never worked as a licensed lawyer in Sudan or practiced before courts in Sudan. Upon passing the Legal Profession Examination, a candidate to practice as an attorney in Sudan must complete a twelve-month training period in the office of a licensed Sudanese attorney, unless he or she receives an exemption.[1] It is a matter of public record that Mr. Idris was admitted pursuant to such an exemption, but not until 2010.[2] His CV further indicates that he has resided and worked in the UK since 2000. These facts, and the basic errors contained in his declaration, strongly suggest that Mr. Idris may never have practiced law in Sudan at all.

1) There Is No "Sudanese Common Law"

5. Early in his declaration, Mr. Idris states that the "principal legislation" governing tort allegations is the Civil Transactions Act 1984 ("**CTA**"), which is correct. Idris ¶ 23. It is also true that, historically, Sudanese law is common law based. However, contrary to Mr. Idris's repeated assertions *see, e.g.*, Idris ¶¶ 23, 28, 33, there is no system or concept that can properly be called "Sudanese common law." Any reference in Sudanese judicial precedents to the term "common law" is to the English common law. The same is true of any references in Sudanese law books. Thus, his term "Sudanese common law" is a creation of Mr. Idris that has no roots in Sudanese legal history. I believe that his purpose in creating this concept is manifested in paragraphs 33-36 of his declaration, where he attempts to merge the CTA into this so-called "Sudanese common law." As I will discuss, this attempt has no basis in any Sudanese legal authority or doctrine.

2) Mr. Idris Incorrectly Describes How A Court Will Determine And Apply Sudanese Law

6. Mr. Idris's reliance on the principles of "fairness, equity, and justice" as the means by which a Sudanese judge will determine what Sudanese law provides and how it should be applied, Idris ¶¶ 29-32, reflects an obsolete legal tradition that does not comport with current Sudanese law and practice. Indeed, the Interpretation of Statues and General Clauses Act of 1974 (the "**ISGCA**") on which Mr. Idris relies, Idris ¶¶ 25, 76, is not currently applicable to the CTA. Instead, the CTA is currently governed by the Sources of Judicial Decisions Act of 1983 (the "**SJDA**"), which was enacted as part of the nationwide program of legal reform adopted in 1983, pursuant to which Shari'a law was introduced and then the CTA was adopted in 1984. The SJDA displaced all other law governing how a court should identify and apply the law in a particular circumstance, including both where an express statutory provision or a judicial precedent applies and where neither can be relied upon to decide the issue that the court must address.

7. Section 3(B) of the SJDA governs situations where no express statutory provision exists, and requires judges to apply principles laid out in an explicit order of priority. Most relevantly, "*judicial precedents in Sudan that are not in conflict with Shari'a, and subsidiary opinions and principles decided by Shari'a jurists*" are accorded priority over the equitable principles of "*justice*" and "*judgement in accordance with good conscience.*" SJDA, Section 3(B)(5) & (B)(7). Notably, these equitable principles are last in the order of

[1] Sudan Advocacy Act § 6.
[2] Registration as an attorney licensed to practice before Sudanese courts is a matter of public record.

priority under the SJDA. Accordingly, and in contrast to the argument put forth by Mr. Idris, these principles are a judge's last recourse, to be applied only in the event that no express statutory provision controls, *see* Idris ¶¶ 29-32, and even then Sudanese judicial precedent and Shari'a compliant legal treatises supersede these principles.

3) Mr. Idris Incorrectly Describes How Judicial Precedent Is Applied By Sudanese Courts

8. The pre-CTA case law and statutory interpretation rules cited by Mr. Idris, Idris ¶¶ 25, 27-36, are wholly inapplicable. Since the landmark Supreme Court decision in *Ismat Abdeljabar Mohamed v. Fareed Abdeljabar Mohamed*, S.L.J.R. 1995, at 158, courts in Sudan adhere to the order of priority mandated by the SJDA. In its judgment, the Supreme Court stated the following:

> *The "resulting trust" principle is one of the principles judicially established in Sudan that takes into account the English judicial precedents. We had been applying that law based on the Court's understanding of the principles of equity, justice and good conscience, which were derived from [English] law—but these have gone away and shall not come back. As we have applied Shari'a, neither the CTA, nor the land settlement and registration law in Sudan, recognize these principles.*

9. The Supreme Court went on to state: *"The era during which we made recourse to English laws or other laws has gone except those that ally with Shari'a."* S.L.J.R. 1995, at 158. Accordingly, Mr. Idris's citations to Dr. Zaki Mustafa, the Civil Justice Ordinance (1929), and the Civil Law of Egypt (1971), are completely inappropriate. Idris ¶¶ 31-33. Further, Mr. Idris incorrectly describes the application of Section 6 of the Civil Procedures Act 1983 ("**CPA**"). Idris ¶ 32. As I noted in my previous declaration, Section 6/1 of the CPA (which instructs the courts to "apply what would constitute justice") applies only in the absence of *procedural* provisions. *See* Hassabo Decl. ¶ 17. In contrast, Section 6/2 governs the absence of substantive legal provisions, and requires that courts apply principles laid down by judicial precedent. Hassabo Decl. ¶ 17. To the extent Section 6/2 permits consideration of equitable principles, the dictates of applicable statutes and judicial precedent receive higher priority. SJDA, Section 3.

4) Mr. Idris Makes Incorrect Statements About Sudanese Legal History

10. Mr. Idris also confuses historical facts regarding the adoption of Shari'a, the CTA and the Justice Judgements Journal ("**JJJ**"), and wrongly states that "the JJJ [] has no direct application in Sudanese law." Idris ¶ 83. The severity of his error merits a detailed, point-by-point response:

(i) Mr. Idris states that "[i]n 1983 the Nimiri Regime declared that Islamic Shari'a should be the basis of Sudanese legislation." ¶ 33. This is not correct. The Nimiri Regime announced the formation of an Islamic State as well as the introduction and comprehensive application of Islamic Shari'a laws, which is to say that Shari'a was not only made the basis of Sudanese legislation, as Mr. Idris wrongly suggests, but it became the basis for the entire legal system of

Sudan. This remained the case after the existing government was established, as shown in Article 5/1 of the 2005 Sudanese Constitution (providing that national legislation shall have Shari'a as its source).

(ii) Mr. Idris also states that "[t]his did not seek to undermine the status of the Sudanese common law as had developed[,]" Idris ¶ 33, and further indicates that the CTA was intended to be a Shari'a-compliant codification of Sudanese common law. *Id.* This too is not correct. The CTA has nothing to do with English common law or any "Sudanese common law" that Mr. Idris cites. Instead, the CTA could accurately be described as a "copy-paste" from the Jordanian and Egyptian civil codes, which (along with the civil codes of most other Arab countries) were derived from, and based, on the JJJ. *See* Sarour, at 57 ("*In Jordan, the JJJ was the law governing the financial relations between individuals which was issued by the Ottoman Legislature on 1286 Hijri and applied on 1293 Hijri (1876 B.C.) in all countries subject to the Ottoman Empire.*"). In summary, the CTA was in fact a law imported in its entirety from Jordan, Egypt and the JJJ; it was placed before the Parliament in Sudan for enactment as part of the new Islamic legal system, and it became the civil law of Sudan. The CTA was issued as a Provisional Presidential Order No. 6/1984, and was approved by the Parliament and issued as law No. 8/1984 on 14th February, 1984. Therefore, commentary on other bodies of law also based on the JJJ, such as Egyptian and Jordanian legislation, is highly persuasive when interpreting Sudanese law.

(iii) Mr. Idris's statement that "in the view of some, common law should have continued on its trajectory without the additional requirement of harmonization with Shari'a law," Idris ¶ 33, is both inaccurate with respect to Sudanese law and irrelevant. *See supra* ¶ 5.

(iv) Mr. Idris's further statements questioning the applicability of the JJJ—which itself is the first historical codification of Shari'a rules, and the source upon which Sudanese law is based—are inaccurate. *See* Idris ¶¶ 34, 83. Precisely because the JJJ is the sole source of legislation among many Arab nations (including Sudan, Jordan, Egypt, Syria, Tunisia, Oman, Qatar, Kuwait and the United Arab Emirates), each such nation shares common sources of legal interpretation. Sarour, at 57. Of these, the most prominent are Ali Haider and Sanhouri; Sarour also cites widely in his influential treatises on the CTA to commentators of the JJJ. *See* Hassabo Decl. ¶¶ 19-20, 50. These sources are widely cited by Sudanese courts.

(v) Lastly, on matters regarding the interpretation of the sources of Sudanese law, Mr. Idris states that "historically in Sudanese law, Egyptian code was usually looked to for analogy to procedural rather than substantive matters." Idris ¶ 34. This is not correct. In my entire career, I have never come across any judgment in which the court cited Egyptian procedural laws.

11. However, I do agree that, where the Sudanese legislature has not abrogated pre-CTA statutes, Sudanese courts do sometimes take into account certain other sources of law that are not based on Shari'a, Idris Decl. ¶ 36, such as with Sudanese statute governing trademarks and patents. However, none of these areas of law are relevant in this case.

5) Mr. Idris Mischaracterizes The Provisions Of The CTA

12. Mr. Idris's mischaracterizations of Sudanese law—which, again, are perhaps attributable to his lack of experience and understanding, which in turn may be attributable to the fact that he appears never to have worked as a licensed lawyer in Sudan or practiced before Sudanese courts—are particularly egregious in his statements concerning the CTA.

13. For example, he states that "The CTA was not intended to override Sudanese common law. It was an attempt at codification of the common law in civil matters, with an additional purpose of seeking to harmonize interpretation of the common law with Shari'a principles. This purpose was accomplished by stating some (but not all) provisions of Shari'a custom in legislative terms." Idris ¶ 38. This is wrong for three primary reasons:

i. Contrary to Mr. Idris's mischaracterization, the CTA was in fact intended to be a drastic deviation from the common law; all Sudanese civil laws based on common law were abolished and replaced by the CTA. This was expressly provided for in Section 2 of the CTA, which repealed 11 common-law-based acts of legislation. *See supra* ¶ 5.

ii. Likewise, Mr. Idris's statement that the CTA was intended to "harmonize" Shari'a with the non-existent Sudanese common law is incorrect on the face of the statute. Section 4 of the CTA, which sets forth the areas of application of the CTA, makes clear that the CTA was intended to displace all existing laws in the area of torts, among many dozens of others. Section 4(b), CTA (1984). Previously, those subjects of Sudanese law were based on principles of English common law.

iii. Lastly, there was no interpretation of common law using Shari'a principles, or vice-versa. In fact, the CTA expressly provides that interpretation of this new Islamic law is to be made by reference to Islamic jurisprudence:

> *"In applying the provisions of this Act, interpreting the words and expressions used therein and in cases not provided for by any law, the courts shall be guided by the Principles of Sharia and shall follow the rules provided for in the SJDA."* Section 3, CTA (1984).

**Part II – Causation**

14. Mr. Idris states in his declaration that I have failed to consider what he refers to as a "liability to compensate principle" under Sudanese law. Idris ¶ 49. He argues that this purported principle arises from provisions of the CTA, and that it allows a defendant to be held liable for a plaintiff's injuries even where that defendant cannot be shown to have caused that plaintiff's injuries. Idris ¶¶ 49, 60 ("[T]he operation of the CTA does not require causation to give effect to the liability to compensation for injury principle"). In other words, Mr. Idris relies on this purported principle to suggest that Sudanese tort law does not require proof of a causal relationship between the defendant's conduct and the plaintiff's injury. However, as I describe below, there is no such "liability to compensate" principle under Sudanese law. It appears to be wholly of Mr. Idris's creation. Neither the CTA nor judicial precedents recognize such a principle. Nor is there any other applicable tort law principle

that dispenses with the requirement that a plaintiff prove a causal link between the defendant's act and the plaintiff's injury, except where the case concerns a vicarious liability relationship or dangerous instrumentalities and relates to shifting the burden of proof to the defendant under Section 141 to prove that the tortious act was caused by an independent person. *See infra* ¶¶ 33-35, 60-61.

15. As I stated in my first report, Sudanese law clearly requires a causal link between a defendant's actions and a plaintiff's injuries. Hassabo Decl. ¶ 32. Furthermore, the Sudanese standard for adjudicating tort causation is clear: a defendant's actions must be shown to have "directly" caused the plaintiff's injuries, and they must also be a "substantial factor" in causing those injuries, such that the injuries are a "natural consequence" of the defendant's actions. *Id.* at ¶¶ 33-34.[3] Where a defendant is alleged to have "indirectly" caused a plaintiff's injuries, such a defendant must also have acted with premeditation or intent to cause the harms complained of, in order to be held liable. *Id.* at ¶¶ 47-48. As I stated in my first report, Plaintiffs' allegations in the Complaint do not allege facts sufficient to meet these requirements, and accordingly, BNPP's conduct would not be found by a Sudanese court to have "caused" Plaintiffs' injuries.

A. Mr. Idris's Attempt To Eliminate The Causation Requirement In Sudanese Tort Law With His "Liability To Compensate Principle" Is Baseless

16. With respect to the "liability to compensate principle" that Mr. Idris describes, there is no such principle under Sudanese law; in my entire career, I have never heard a Sudanese court refer to or utilize it. *See, e.g.*, Idris ¶¶ 44, 49-58. First, no section of the CTA refers to "liability to compensate," and certainly not as an alternative to standard causation requirements. Second, I have not seen a single decision by a Sudanese court indicating that Sections 22(8), 153, or 138 of the CTA incorporate any such principle. *See* Idris ¶¶ 41-44. Third, none of the commentary that Mr. Idris cites supports his position that such a principle exists, or that the CTA requires anything less than standard causation to find a defendant liable. Accordingly, I do not believe that Mr. Idris's statements regarding the existence of this principle are accurate.

B. Mr. Idris Mischaracterizes The Causation Requirements For Tort Liability That Are Set Forth In The CTA

17. By confusing or misinterpreting provisions of Sudanese law and judicial precedent, Mr. Idris seeks to distract from the fundamental principle that ordinary causation must be demonstrated by any plaintiff in a tort suit. *Compare* Idris ¶ 60 ("[T]he CTA does not require causation to give effect to the 'liability to compensation for injury' principle"), *with* CTA Section 138 (requiring that a tort plaintiff prove the three elements of a tort: the tortious act, causation, and resulting injury); *see also* Sarour at 38 ("*In tortious liability, the injured party must prove existence of all elements of liability, the tortious act, the injury and the causation between the injury and the tortious act.*").

18. Mr. Idris cites Section 138 of the CTA as the provision from which he claims the "liability to compensate principle" arises. Contrary to Mr. Idris's assertions, however, Idris ¶¶ 49-50, Section 138 does not provide for this so-called liability to compensate principle. Quite the opposite, in fact: it confirms that liability requires proof of a causal link

[3] The respective standards specific to "direct" and "indirect" tortfeasors are set forth in my first report. Hassabo Decl. ¶¶ 41-51.

between the defendant's act and the plaintiff's injury. *See both* Idris ¶ 41 *and* Hassabo Decl. ¶ 24 (under Section 138, any act that "causes injury" to another shall oblige the actor to compensate such injury "even if the actor lacks legal capacity") (emphasis added). The aspect of Section 138 that pertains to "legal capacity" that Mr. Idris raises is irrelevant; this refers to the legal competence of a minor, elderly or disabled person.

19. Mr. Idris also cites to Section 22(8) and Section 153 of the CTA to suggest that the CTA does not require in every instance that a plaintiff prove causation. Idris ¶¶ 42-44. These provisions do not stand for that proposition. They provide rights of action for any infringements of "personal rights"[4] and "moral rights."[5] However, such rights to compensation are only conferred by Sections 138 and 152, under which the plaintiff must prove before a court of law: (i) the tortious act, (ii) the injuries suffered by him, and (iii) the causation between the injuries and the acts of the tortfeasor. The right of compensation under either provision cited by Mr. Idris does not exist without first establishing the elements of liability. Here, Mr. Idris is apparently attempting to escape this cornerstone of tortious liability in Sudan and in Islamic jurisprudence generally—the requirement of a causal link between the act and the injury—by replacing the causation element with his so-called "liability to compensate principle." Idris ¶ 44. This is not the law in Sudan.

20. Mr. Idris also mischaracterizes Section 152 of the CTA in arguing that it "says nothing about causation but about [sic] assessment of compensation." Idris ¶ 61. Here again, Mr. Idris is trying to replace the causation element of a tort with his fictitious "liability to compensate principle." Mr. Idris's argument that "[t]he natural consequences formula gives Courts greater discretion to order compensation even when the rules of causation may not have been fulfilled," Idris ¶ 63, is baseless, and contradicts the opinions of both the jurists and precedent that he cites. For example, Mr. Idris's claim is directly contradicted by the *Blue Nile Construction v. Ikhlas Elsadig Dao Elbait* (the "***Ikhlas* case**"), S.L.J.R. 2000, at 129, and Sarour, whose analysis of Section 152 reveals that it addresses both causation and compensation. In the *Ikhlas* case, the Supreme Court stated that:

> *It is not enough under the CTA (1984) to prove the tortious act or the injury to establish liability of a person; it must also be established that the injury was caused by the tortious act. This is the causation which is the second element of tortious liability, as provided in Section 152, which states that the injury must be a natural consequence of the tortious act.*

*Ikhlas* case at 132 (emphasis supplied). Interpreting this ruling, Sarour stated that "*[t]herefore, the injured party must prove the causation between his injury and the act attributed to the liable person.*" Sarour at 159 (emphasis added). Thus, it is abundantly clear that Section 152 does require proof of causation as an element of a tort claim.

21. In contrast to Mr. Idris's claims, Section 152's "compensation" requirement merely sets forth the standard for causation I have already described in my first declaration. *See* Hassabo Decl. ¶ 33 (to merit compensation, a defendant's tortious act must have been a

[4] CTA Section 22(8). It is to be further noted that Section 22(8) governs only "unlawful acts". Thus, as discussed in Part II, Section 22(8) is totally inapplicable here because all financing acts of BNPP were lawful under Sudanese law

[5] CTA Section 153.

"substantial factor" in "directly" causing plaintiff's harm, and such harm must have been a "natural consequence" of defendant's actions); *see also* Sarour, at 161; *Yassin Abbas v. Hassan Babikir*, S.L.J.R. 1975, at 50.

22. As I described in my first report, a tort plaintiff must always demonstrate that the defendant's actions were a "substantial factor" in causing the damage—"incidental factors" or a "coincidental contribution" are insufficient to meet the "natural consequence" test. *See* Hassabo Decl. ¶¶ 33-39 (describing Section 152's "substantial factor" formula for determining legal causation). Indeed, Section 152 "strongly supports" application of the "substantial factor" standard for determining causation. Sarour at 161; *see also* Sarour at 161 (citing the case of *Yassin Abbas v. Hassan Babikir*, S.L.J.R. 1975, at 50, for the proposition that Section 152 causation "excludes injuries that are not directly linked with the defendant's fault[.]").

C. Mr. Idris Cites Irrelevant Or Nonexistent Sources of Law To Suggest That Causation May Not Be Required

1) Mr. Idris Misquotes Prominent Commentators On The Subject Of Tort Causation

23. Mr. Idris's declaration cites to commentary that is unrelated to causation standards, in what appears to be an attempt to suggest that Plaintiffs need not allege that BNPP caused Plaintiffs' injuries. Additionally, he includes language in his quotations from that commentary that cannot be found in the original text. Regardless, as I stated in my first report, causation is an essential element of tort liability. Hassabo Decl. ¶¶ 24, 33-39; *see also supra* Part II.

24. For one, Mr. Idris confuses the concepts of "damage/injury" and "fault" in Islamic law, by attempting to replace the element of causation with the mere fact of injury. *See* Idris ¶¶ 51-52. In his attempt to base liability on the mere fact of damage or injury, he simply misquotes Obaid. Mr. Idris offers the following quotation:

> *[T]he legality of damages in Islamic Jurisprudence has not passed through stages of development, but was revealed as part of the Quran in a number of verses and prophet's statements (Ahadeeth), as deduced by Islamic jurists in a number of rules. This is because under Shari'a law the damage is both the cause on which compensation is established and the reason for it.*

Idris ¶ 52. However, the underlined language simply does not appear in Obaid, and I infer Mr. Idris drafted it himself in an attempt to suggest that Obaid supports his conclusion, when in fact it does not. *See* Obaid, *Tortious Liability* at 64-65. Instead, Obaid clearly sets forth the "three elements of tortious liability… which are fault, injury and causation." *Id.* at 63.

25. It is possible that Mr. Idris was confused by Obaid's further statement that "*Islamic jurisprudence, as a general rule, does not give weight to fault in tortious liability*," *id.* at 63, but this usage of "fault" does not disturb the widely accepted requirement in Islamic jurisprudence that a defendant must actually cause a plaintiff's injury. It relates instead to the legal concept that a "*direct actor is liable in tort for all his acts that caused injury to third*

*parties.*" Obaid, *Tortious Liability* at 63-64;[6] *see also* Hassabo Decl. ¶¶ 47-48 (explaining that under Section 5(u) of the CTA, a party who causes *indirect* harm will not be liable unless there is a finding of intent).

26. Mr. Idris's reliance on his "liability to compensate principle" to dispense with the necessary element of causation also contradicts Sanhouri, who states that: *"[C]ausation between the fault and injury means the existence of a direct relation between the fault committed by the actor and the injury; causation is the third element of liability and it is independent from the element of fault."*[7] Mr. Idris's other citations to Sanhouri regarding "rebuttable presumptions of fault" are completely irrelevant because these passages refer to the statutory standards under the CTA Sections 148-150, which—as I note below with regard to the *Ikhlas* decision—apply to the use of dangerous equipment or other such instrumentalities. *See infra* ¶ 27; Idris ¶ 68; *see infra* Part II.C.3.

27. Furthermore, Mr. Idris is incorrect that the *Ikhlas* case applied a burden-shifting that is relevant here. Idris ¶¶ 57, 66. The only references to such terms were in the context of objective liability for the maintenance of a dangerous condition or instrumentality, a situation that is inapplicable here. *See infra* Part II.C.3 (discussing provisions of the CTA that shift the burden to prove causation in highly specific circumstances related to the maintenance of a dangerous condition or instrumentality). In fact, the *Ikhlas* court held that *"[i]t is not enough under the CTA of 1984 to prove the tortious act or the injury to establish the defendant's liability. It must also be established that the injury was caused by the tortious act. This is the causation which is the second element of tortious liability as set forth in Section 152, which requires that the injury be a 'natural consequence' of the tortious act."*

28. Mr. Idris cites, finally, to Obaid for the premise that *"[t]he standard has therefore become an (objective) [sic] where the wrongdoer is held liable on the basis of the public's [sic] interest's considerations [sic] rather than . . . on the basis of his personal fault."* Idris ¶ 69. This citation is inapplicable for the same reasons. In this quotation, Obaid is discussing standards of "objective liability" arising under Sections 148-150 of the CTA, which are inapplicable here. The passage cited discusses increasing risks from modern industrial and technical developments, and relates only to strict and vicarious liability and enhanced professional duties arising from the operation of dangerous conditions or instrumentalities. *See* Obaid, at 44. Regardless, even assuming that this statement is relevant—which it is not—such liability still requires the existence of an act, injury and a causal link between the defendant's act and the plaintiff's injury.

2) Mr. Idris Applies Sudanese Precedents Incorrectly

29. In order to support his theory that Sudanese courts will at times apply reduced standards of causation in adjudicating the liability of a tort defendant, Mr. Idris cites to a number of irrelevant cases.

30. *First*, contrary to Mr. Idris's opinion, the supposed "liability to compensate principle" was not the basis of decision in the case of *Khartoum Municipal Council v. Michel Cotran*, S.L.J.R. 1958, at 85. Idris ¶ 54. The basis of the decision in this case was the breach of a duty of care on the part of Khartoum Municipal Council. *Id.* This decision imposed

[6] The fact that "Islamic jurisprudence . . . differentiates between direct and indirect actors" is discussed in my first declaration. *See* Hassabo Decl. Part IV.
[7] Sanhouri, "El-Waseet in Interpreting the Civil Code," Part 1 (7th ed. 2007), p. 745.

liability on the defendant because its breach of a duty of care caused plaintiff's injuries. *Id.* There were four principles laid down by the court in this case: three of them about the scope of the defendant's duty of care, and the fourth about the quantum of damages. *Id.* The "liability to compensate principle" was not one of these principles. Further, the court found that the defendant was liable for digging and leaving uncovered a ditch because those actions caused the plaintiff's injuries, and that the plaintiff had been contributorily negligent. Finally, the defendant in *Khartoum Municipal Council* was held to have breached a special duty of care owed by those who create dangerous conditions adjacent to public thoroughfares. In all respects, *Khartoum Municipal Council* is irrelevant to the allegations in the Complaint.

31. *Second*, Mr. Idris cites the case of *Adminstratrix of Costas Zis* as an example of a case applying the "liability to compensate principle" as a basis of decision. *See* Idris ¶56; *Adminstratrix of Costas Zis v. German and Swiss Engineering and Construction Company and Phoenix Assurance Company*, S.L.J.R. 1960, at 141. However, this principle is not presented or discussed in this case. Further, as this case concerns only contributory negligence, which requires proof of the three normal elements of a tort, this case is irrelevant to the present Complaint. Still, the court's award depended on a finding that the defendant's failure to provide adequate warning about a ditch he dug was a contributing cause of the plaintiff's death (the other cause being the plaintiff's own negligence). *See* Idris ¶56.

32. *Third*, Mr. Idris's reliance on the UK House of Lords ruling in *Fairchild v. Glenhaven Funeral Services Ltd.* is not appropriate. Idris ¶ 71. First, English common law is not persuasive as a source of law for interpreting the CTA. *See* Hassabo Decl. ¶ 21 (English common law only persuasive where there are no pertinent provisions of Sudanese law); *see also supra* ¶ 9. Second, the case cited is irrelevant. It addresses a situation where multiple defendants were equally likely to have caused the plaintiffs' harm, but the harm could not be attributed directly to any single defendant. [2002] UKHL 22, [2003] 1 AC 32 (permitting joint liability where the asbestos that caused the plaintiff's mesothelioma could not be attributed to any one of multiple defendant employers, each of whom had exposed plaintiff to asbestos).

33. *Fourth*, Mr. Idris cites the *Ikhlas* case. Idris ¶ 57. As with the other cases, the *Ihklas* case contains no citation or reference to a "liability to compensate principle." Further, this case does not stand for the propositions for which Mr. Idris cites it, since the rules governing tortious liability in the *Ikhlas* case were specified in Sections 148-150 of the CTA, which do not apply here. Sections 140-150 of the CTA address only the scope of master/servant liability, objective liability (as defined below), occupational liability, and professional liability. They also provide a stricter standard of liability for the owners of, or those responsible for, dangerous equipment or other such instrumentalities, which I shall refer to as "objective" or "strict" liability. The *Ikhlas* court found the company defendant liable under the stricter standard for operators of dangerous equipment, because "*whoever guards a thing shall be liable for any damage* ***caused*** *by that thing ... and where the thing is dangerous, liability shall be severe.*" Obaid, Haj Ali, Tortious Liability, Sudan Experience (2nd edition 2017) p. 47 (describing the holding in the *Ikhlas* case); *see also* Sarour, at 331 (Section 148 requires establishing "*causation between the act....and the injury*"). This analysis is irrelevant here, though, because Plaintiffs do not allege that BNPP operated a dangerous instrumentality under a professional duty of care, or that BNPP is vicariously liable as the "master" or employer of the Sudanese government and its proxies.

34. In contrast to the provisions at issue in the *Ikhlas* case, which govern liability for the maintenance of dangerous conditions or instrumentalities, Section 138 of the CTA

provides general rules that govern Plaintiffs' claims against BNPP. *See supra* ¶¶ 18-19 *and* Hassabo Decl. ¶¶ 24, 31-32. These are the standards applicable to the facts of this case. In contrast, Mr. Idris's claim that the court "established liability" pursuant to Section 151 of the CTA is incorrect. Idris ¶ 66. Section 151 does not create any basis for establishing liability, but only provides the court with discretion to apportion liability among joint direct tortfeasors determined to have caused a plaintiff's injuries.

3) Mr. Idris's Discussion Of Objective Liability Is Misplaced

35. In a further attempt to displace the element of causation, Mr. Idris cites to a passage from Sarour that purportedly allows a presumption of causation to arise where the plaintiff proves the existence of a tortious act and the presence of damage. *See* Idris ¶ 70. This passage, however, relates only to a narrow statutory exception (inapplicable here) to the CTA's general rule that a plaintiff must establish that the defendant's tortious acts caused his injuries. *See* Hassabo Decl. ¶ 31-39; *see also supra* ¶ 26. Section 141 (the provision that Mr. Idris cites) provides only that, where defendants maintain particularly dangerous conditions or instrumentalities, the person or entity responsible for guarding such a condition may be presumed to have caused any harms that arise from the condition. Section 141 also provides that a defendant who is presumed under these circumstances to have caused the injury may rebut this presumption by proving either that there was a third-party or independent cause, or that the plaintiff himself caused the injury. As discussed above, *see supra* ¶ 33, those provisions apply to such circumstances as employer/employee liability for the maintenance of industrial or mechanical hazards, and are irrelevant here.

36. Furthermore, once again certain of the language that Mr. Idris indicates is part of the quoted text does not actually appear in that text. I have underlined this passage in the following reproduction of what appears in Idris ¶ 70 (which is attributed to Sarour):

> *[I]f a plaintiff proves the existence of a tortious act and the presence of damage, a presumption of causation arises in his favour which shifts the burden of proof on to the defendant to prove lack of causation between the damage and the tortious act .... [I]f the liability is based on a presumed fault, then a presumption of causation arises in addition to the presumption of fault. To rebut the presumption of causation, the tortfeasor will be required to prove the existence of an independent cause. These situations most typically arise in cases where injustice must be avoided.*

37. Contrary to Mr. Idris's presentation, Sarour was not rejecting the element of causation as a required element of a tort. Instead, he was addressing shifting the onus of proving the element of causation from one party to another—but this burden-shifting exists only in the circumstances described above.

D. Mr. Idris's Own Report Demonstrates That Causation Is Required To Prove Tort Liability

38. Mr. Idris's own report confirms that causation is required. He cites repeatedly to legal authority which confirms that causation of the plaintiff's harm is a prerequisite for

the defendant's liability. *See, e.g.* Idris ¶¶ 50-52 ("The objective of [Section 138] is to compensate the injured party for the damages caused by the act of others"); ¶ 39 ("legal obligation…not to cause damage to others"); ¶ 41 (citing to the "causation" requirement of Section 138 of the CTA); ¶ 45 (defining "tortious act" as "one that causes damage"); ¶ 50 (citing Obaid's statement that Sudanese law provides compensation for "damage caused by the act of others"); 67 (requiring causation even where a defendant is held strictly liable); ¶ 81 (citing to Section 6 of the CTA, which provides relief for "damage caused"); and ¶ 90 (concluding that Section 138 of the CTA governs the "culpability of an actor who causes injury").

39. In sum, as I confirmed in my first declaration, tort liability in Sudan under Shari'a and governing statutes is not based purely on the existence of damage or injury, but requires a plaintiff to prove a causal relationship between the defendants' conduct and the plaintiff's injury. There is no authority supporting Mr. Idris's reliance on a "liability to compensate principle" that dispenses with this causation requirement or has any other impact on Sudanese law. The cases Mr. Idris cites do not represent the concepts for which he cites them.

## Part III – Direct and Indirect Tortfeasors

### A. Section 5 of the CTA Sets Forth Binding Rules Governing The Liability Of Direct And Indirect Tortfeasors

40. In my first declaration, I stated that two provisions of Section 5 of the CTA control whether Plaintiffs have properly alleged tort claims against BNPP under Sudanese law. First, Section 5(u), which governs liability for indirect tortfeasors, provides that an indirect tortfeasor, which is what BNPP is alleged to be in what I described as the Secondary Allegations in the Complaint, Hassabo Decl. ¶ 22, cannot be liable unless he acted with intent or premeditation to achieve the harmful result. Hassabo Decl. ¶ 48. Second, Section 5(v), which governs liability of joint tortfeasors, which is also what BNPP and the GOS are alleged to be in the Secondary Allegations, provides that an indirect tortfeasor cannot be liable where the direct tortfeasor's conduct was necessary to create the harm. *Id.* ¶¶ 53-54. Contrary to Mr. Idris's opinion, the rules governing the acts of direct and indirect tortfeasors specified in Section 5 of the CTA are the only rules applicable to the allegations of secondary liability against BNPP. Hassabo Decl. ¶ 41. Numerous Supreme Court decisions have applied Section 5 to questions of secondary liability. This conclusion also is confirmed by a review of well-known and influential treatises. Furthermore, Mr. Idris's claim that Section 5 inherently conflicts with other provisions of the CTA is both illogical and incorrect. In sum, Mr. Idris incorrectly applies the Sudanese law of statutory interpretation in arguing that Section 5 does not govern claims of secondary tortious liability.

41. First, Mr. Idris makes a significant error by arguing that the ISGCA has any relevance at all—as I have noted above, this statute predates the legal reforms of 1983-84, and has been explicitly superseded in civil matters by the SJDA. *See* discussion *supra* Part I.[8] Second, the law governing statutory interpretation is the SJDA, which refers to relevant statutory authority and legal precedent as the primary sources of interpretation. *See supra* Part I. Because the CTA is a statute that expressly governs tort liability, its provisions are the primary source of law for Sudanese courts. SJDA Section 3(B); *see also supra* Part I. Third, as is evident from the CTA's preamble, the Legislature expressly intended that Section 5

[8] For this reason, Mr. Idris's reliance on Sections 6(1) and 6(4) of the ISGCA are inappropriate. *See* Idris ¶ 76.

would not only determine the application of the CTA, but would also govern its interpretation: "[T]he following general principles shall be the basic rules for applying the provisions of the CTA."[9]

42. The application of Section 5 to Plaintiffs' allegations is well-supported by Supreme Court precedent and in the works of prominent commentators. *See Omdurman Lands Registry v. Naivma Ismail Hassan*, S.L.J.R. 2000, at 154 ("*Naiyma* case") ("*The Supreme Court has decided that the principles provided for in Section 5 of the CTA are the basic principles for the application of this law*"); *see also* Sarour at 99 (Under the CTA, "*causing an injury does not impose the requirement of compensation on the indirect tortfeasor unless he intended [the harm suffered]....*").

43. Furthermore, this confirmation of Section 5's applicability is consistent with other provisions of the CTA. For example, Section 819 of the CTA—which Mr. Idris either has mistranslated or misconstrues—requires that precedence be given to the basic provisions of the CTA over its specific provisions. *See* Idris ¶¶ 77, 79; CTA Section 819 (*"[a]ccount must be given to specific laws, but the basic rules and provisions of this law shall have precedence over them where so provided*"). Because Section 5 provides such basic principles regulating the liability of direct and indirect tortfeasors, courts cannot interpret and apply the relevant CTA provisions to the facts without referring to Section 5.

44. In sum, Section 5 sets forth the rules governing liability where multiple actors are alleged to have committed torts, and nothing in the provisions Mr. Idris cites suggests otherwise.

B. Mr. Idris's Attempts To Dispute The "Intent" Requirement For Claims Against Indirect Tortfeasors Are Wrong And Illogical

45. As I stated in my first declaration, Section 5(u) of the CTA provides that indirect tortfeasors are not liable unless they intended to achieve the harmful result. Hassabo Decl. ¶¶ 47-48. In an attempt to obviate the intent requirement of Section 5(u) for indirect tortfeasor liability, Mr. Idris proposes to read various provisions of the CTA as if they were in conflict with one another, and proposes that one set of provisions must take precedence over the other. *See* Idris ¶ 77. Despite acknowledging that the CTA does in fact draw distinctions between direct and indirect tortfeasors, Idris ¶¶ 73-74, Mr. Idris then argues that giving these provisions that very effect "would contravene" the basic aims of the CTA. *Id.* at 77. This is incorrect. *See* Hassabo Decl. ¶¶ 47-50.

46. Contrary to Mr. Idris's argument, Section 5(u) does not conflict with Sections 6, 138, 152 or 153 of the CTA. *Id.* at ¶¶ 41-43, 61, 81- 82, 87. First, under Sudanese rules of statutory interpretation, Sudanese courts will construe provisions so that they do not conflict with each other, where that is possible. Second, there is no conflict here. Each of the provisions at issue has limited scope, and is intended to be read consistently with other provisions of the CTA. The three latter sections that Mr. Idris cites—Sections 138, 152 and 153—set forth the elements of a tort (Section 138), principles limiting the scope of causation

[9] Preamble, CTA Section 5. Mr. Idris's argument that the CTA cannot be read to "override the common law," Idris ¶ 75, makes no sense because Sudanese common law" is a creation entirely of Mr. Idris's imagination. *See supra* Part I.A.1; *see also* Hassabo Decl. ¶¶ 18-21 (explaining that common law refers to *English* Common Law). Even when English common law can be read in harmony with Shari'a, courts may consider it only in the absence of applicable CTA provisions or Sudanese precedents. *See* CTA Section 3; *see also* Hassabo Decl. ¶ 21; *supra* ¶ 7.

and the compensation of plaintiffs (Section 152), and provide causes of action for certain types of "moral injuries" (Section 153). *See supra* ¶¶ 18-19. Moreover, according to Section 819 of the CTA, Sections 138, 152 and 153, as specific provisions, must be applied with interpretive guidance from Section 5. Similarly, Section 6 merely sets forth the principle that judicial decisions should be handed down so as to prevent injustice and restore personal rights. *See id.* at ¶ 81. The requirement that direct, instead of indirect, tortfeasors be held liable when a tort involves both does not contradict this principle. Hassabo Decl. ¶¶ 41, 47-48; *see also* CTA Section 5(v). Thus, there is no contradiction between Section 5 and Sections 6, 138, 152 and 153 of the CTA.

47. Mr. Idris also argues that the absence of references to "intent" in these specific provisions logically requires that no other provision may contain a reference to intent. This is absurd—Mr. Idris's own report sets forth a putative "intent" standard under Sudanese law with respect to conspiracy claims. Idris ¶ 135. Even in spite of the fact that Mr. Idris's reference to civil conspiracy is irrelevant, *see infra* Part VI, his own report contradicts his position that Sudanese law does not support any intent requirements. *See* Idris ¶ 74 (citing CTA Section 5(u): "He who commits an act indirectly is not liable for it unless it is done intentionally"). Indeed, Mr. Idris's argument would read Section 5 of the CTA out of existence—this cannot be correct. Regardless, there is no such principle of interpretation in Sudan such as the one he suggests.

## Part IV – Joint Tortfeasors

48. As I stated in my first declaration, the liability of joint tortfeasors is governed by Section 5(v) of the CTA. Hassabo Decl. ¶ 41. In particular, when an injury is caused by both an identifiable indirect actor (here, as alleged by Plaintiffs, BNPP) and an identifiable direct actor (here, the GOS), the joint tortfeasor rule of Section 5(v) is applied in combination with the indirect tortfeasor rule of Section 5(u), and liability rests solely with the direct tortfeasor where, as here, the alleged act of a direct tortfeasor, here the GOS, is necessary to cause the injury and the alleged act of the indirect actor, here BNPP, is merely a part of a sequence of events that led to the act of the direct actor. Hassabo Decl. ¶¶ 52-59. Mr. Idris attempts to contradict this principle in a number of ways, all of which are mistaken. First, he suggests that Section 5 of the CTA is not "substantive." Idris ¶ 91. Second, he claims that permitting Section 5 to apply simply according to its terms would create an intrinsic conflict with other provisions of the CTA. Idris ¶¶ 92, 99-100. Third, he cites to a number of provisions and cases that explicitly deal with unrelated provisions of the law. I will address each of these baseless arguments in sequence.

### A. Section 5(v) Provides Binding Substantive Rules Where, As Here, A Plaintiff's Claims Allege Indirect Tort Liability

49. Mr. Idris suggests that Section 5 of the CTA is not "substantive." Idris ¶ 91. This is incorrect. As with other sections of the CTA, Section 5 provides substantive rules for determining liability in specific situations. His interpretation requires the CTA to be read as being in unresolvable conflict with itself. The Supreme Court has addressed this question and ruled that, contrary to Mr. Idris's position, Section 5(v) and Section 151(1) do not conflict. In any case, Mr. Idris does not propose how Section 5 should be applied, if not "substantively."

50. In the *Naiyma* case, the Supreme Court reaffirmed the application of 5(v) with respect to the potential liability of direct and indirect tortfeasors. *See* Hassabo Decl. ¶¶ 55-

57. The Supreme Court held that Sections 5(t), 5(u) and 5(v) were applicable because the case involved "a direct actor [and] [an] indirect actor." *See* Hassabo Decl. ¶ 57. It then ruled that "where there is a combination between the direct and indirect tortfeasors, the Legislature's decision is that liability shall be attributed to the direct tortfeasor." *Naiyma*, at 154; *see also* Hassabo Decl. ¶ 56.

51. The Supreme Court also ruled in *Naiyma* that "there is no contradiction between the provisions of Section 5(v) and Section 151(1) of the same Act[.]" *Naiyma*, at 154, and the Court applied Section 5(v). In so doing, the court applied different standards in apportioning liability among joint direct tortfeasors—who are liable for breaches of duty with respect to the maintenance of a dangerous condition or instrumentality—and determining the liability of indirect tortfeasors. The *Ikhlas* court applied Section 5 in determining whether any indirect tortfeasors were liable, and applied CTA Sections 145-149 (regarding objective liability for those who maintain dangerous conditions or instrumentalities) to joint direct tortfeasors. As already described, Section 151 merely provides the court with discretion for apportioning blame among the latter kind of tortfeasors. *See supra* Part II. For the same reasons as already stated, this analysis is irrelevant here.

52. Likewise, Sarour describes the *Naiyma* case as holding that, for each of the CTA, the Civil Jordanian Code (also based on the JJJ) and Islamic Jurisprudence, "*the tortious act may be done directly or indirectly, and the unlawfulness of the tortious act as a basis for compensation is determined by this inquiry to directness.... The CTA provided for this rule in Section 5, and the Supreme Court clarified this important rule in the* Naiyma *case.*" Sarour at p. 88.

53. In an effort to undermine the applicability of this binding precedent, Mr. Idris claims that the *Naiyma* case is not applicable to the allegations in the Complaint because it deals with a land conflict and was decided on public policy grounds. *See* Idris ¶ 98. Neither of these arguments is valid.

54. First, there is no distinct body of law relating to torts involving "land title registrations." The *Naiyma* case is a binding Supreme Court interpretation of Section 5 of the CTA, and must be followed. Mr. Idris is also incorrect that *Naiyma* is an exceptional application of Section 5(v) of the CTA. *See* Adil Abdalla Abbakar, SC/CC/199/2006, ¶ 19(ii) at 4; *see also* Jordanian Supreme Court decision No. 697/88, Bar Association Journal (1989), Tawfeeq Printing Press, Amman, at 181 (interpreting an identically-worded Jordanian statute).

55. Second, Mr. Idris is mistaken that *Naiyma* was decided on public policy grounds. He may be confused by text in the decision that reads as follows: "*The Supreme Court decided that the principles provided for in Section 5 of the CTA are the basic principles for application of this law, which means that they are considered to be public policy, and can be invoked by this Court.*" *Naiyma*, at 154. Thus, the "public policy" grounds on the basis of which Mr. Idris claims the *Naiyma* case was decided are in fact the provisions of Section 5 itself.

B. Mr. Idris Is Incorrect That Section 5 Inherently Conflicts With Other Provisions Of The CTA

56. In seeking to avoid application of the Section 5 rules governing multiple tortfeasors, Mr. Idris conflates the rules governing liability of joint tortfeasors with those that

concern master/servant liability. Idris ¶¶ 93-97. He also incorrectly claims that the plain and correct reading of Section 5(v) would undermine other provisions of the CTA. Idris ¶¶ 92, 99-100. But there is no such conflict in this case. First, as I noted above, under rules of statutory interpretation, Sudanese courts will read provisions of the same statute so that they do not conflict with each other, where that is possible. Second, the provisions Mr. Idris cites do not actually conflict with Section 5 of the CTA. Third, Mr. Idris's citations to cases and CTA provisions that interpret the scope of master/servant liability are irrelevant and should be disregarded.

57. As I stated in my first declaration and above, Section 5 provides binding rules for determining the liability of direct, indirect and joint tortfeasors. Hassabo Decl. ¶ 41 ("Where there is a combination between direct and indirect tortfeasors, the liability shall be attributed to the direct tortfeasor"); *see supra* Part III. That there are other, non-conflicting rules poses no obstacle to the application of Section 5 here.

1) Section 5 Does Not Conflict With Other Provisions Of The CTA

58. Mr. Idris states that "if the concepts of direct and indirect actions set forth in sections 5(t), 5(u), and 5(v) are followed, it would undermine express provisions that provide for joint tortfeasor liability[.]" Idris ¶ 92. At the outset, it is incorrect to read different provisions of the same law so that they conflict with each other if there is a reading of the two provisions that would permit them to be read in harmony. *See* CTA Section 5(zz) ("Where a provision is clear, no conflicting or independent interpretation shall be allowed"). Because a reading that harmonizes these various provisions is possible, a Sudanese court would not read such a conflict into the CTA.

59. In suggesting that Section 5 and other provisions of the CTA are in conflict, Mr. Idris erroneously states that my reading of Section 5 would always "require directness for a finding of liability." Idris ¶ 92. This is not an accurate reading of my first declaration. Section 5(v) applies where a plaintiff's claims specifically implicate liability for both a direct and an indirect tortfeasor, as is alleged in the Complaint here, *see* Hassabo Decl. ¶¶ 52-54, not for every question of tort liability.

60. Moreover, the sections of the CTA that Mr. Idris cites as conflicting with Section 5 do not apply to the circumstances of this case. Mr. Idris states that Section 151 of the CTA conflicts with Section 5. As described above, *see supra* ¶¶ 42, 50-55, there is no such conflict—these provisions simply apply in different circumstances. Mr. Idris also cites Section 147 for the proposition that joint tortfeasors may each be liable for the full value of the claim. Idris ¶ 96. But Section 147, which is contained within Chapter 16, Part 2 of the CTA, and which governs master/servant liability, provides only that an employer held liable for the negligent acts of its employees may seek indemnification from that employee. *See* CTA Section 145 (permitting liability for an employee responsible for guarding a dangerous condition) and Section 146 (permitting liability of the master for torts or crimes of the servant). As Plaintiffs have not alleged a master/servant relationship between BNPP and the GOS, this section is inapplicable here.

61. Furthermore, Section 147 itself refers only to the allocation of compensation obligations among those held liable pursuant to such a finding of master/servant liability—it does not create an independent basis for liability. Only if a vicarious liability relationship is established under Sections 145 or 146 can a plaintiff invoke Section 147. Dr. Elsanhouri's

statement that Mr. Idris quotes in ¶ 97 of his report refers to the same principle, and is irrelevant.

2) Mr. Idris's Citations to Cases Interpreting Master/Servant Liability Are Irrelevant

62. As with the statutory provisions discussed above, the cases that Mr. Idris cites are irrelevant to interpreting the facts of this case. None of these cases addresses the liability of direct and indirect tortfeasors, and none interprets the application of Section 5 to such parties. Because the Supreme Court has made it clear that Section 5 sets forth binding rules in such circumstances, these cases should be disregarded.

63. First, Mr. Idris cites *General Motor Insurance Company v. Saeed Hassan.*[10] though it is unclear for which proposition he cites it. Idris ¶ 101. Regardless, this case interprets—under the master/servant provisions of the CTA—the procedure whereby a plaintiff may sue the owner of a car for torts committed by the car's driver. However, these provisions of the CTA are irrelevant to determining the liability of an indirect tortfeasor. *See supra* Part III. Mr. Idris appears to suggest that BNPP may be equated to the owner of the car, and the GOS to its employee, the driver. As described above, however, Plaintiffs never allege that the GOS was employed by BNPP, and so this case is both factually and legally inapposite. *General Insurance Company v. Alsharief Alshaikh Ahmed Norain.*[11] Idris ¶ 103, is inapposite for the same reason (that neither Mr. Idris nor Plaintiffs assert such a relationship between BNPP and either GOS or the Plaintiffs).

64. Second, Mr. Idris cites *Khartoum Municipal Council* for the proposition that "it is no defence against a claim that another tortfeasor could have been sued instead." Idris ¶ 101. As already described above, *see supra* ¶ 30, this case interprets the scope of the duty of care owed to the plaintiff, which is not at issue in this case. Furthermore, Mr. Idris cites it for an irrelevant proposition, because Sudanese law does not impose liability at all on indirect actors, where other actors directly cause the harm at issue.

65. Finally, Mr. Idris cites to *Sudan Insurance Co. Ltd. v. Shama Mohamed Baseer.*[12] Idris ¶ 104. Again, the reason for his citation is unclear, since *Sudan Insurance Co. Ltd.* addresses the proper procedure for joinder of multiple defendants under the Civil Procedures Act. This is irrelevant.

66. Unlike the cases cited in Mr. Idris's report, Section 5(v) specifically governs cases in which liability is attributed to direct and indirect joint tortfeasors, and where no master/servant relationship exists between those parties. Thus, contrary to Mr Idris's claims, and because Plaintiffs have alleged no master/servant relationship between BNPP and the GOS, the CTA sections and cases on which he relies are irrelevant to Plaintiffs' claims.

## Part V – Lawful Exercise Of Rights

A. BNPP Cannot Be Liable In Tort For Its Conduct Under Sudanese Law Because Its Conduct Constituted A "Lawful Exercise Of Rights" Under CTA Section 28

[10] SC/CA/1977/259.
[11] SC/CA/1976/509.
[12] SC/CA/1984/94.

67. In my first declaration, I stated that BNPP's provision of financial services to Sudanese banks constitutes "lawful exercises of right" under Section 28 of the CTA for which BNPP could not be found liable under Sudanese tort laws, and that none of the limited exceptions to this rule apply. Hassabo Decl. ¶¶ 60-73.

68. In his declaration, Mr. Idris argues that BNPP cannot rely on the "lawful exercise" protections against tort liability contained in CTA Section 28 because BNPP was not registered as a Sudanese bank. *See generally* Idris ¶¶ 106-127. This is neither responsive to my declaration, nor is it an accurate statement of the law in Sudan. As I stated in my first declaration, Section 28, with certain exceptions that do not apply here, protects defendants for acts that are lawful in Sudan, "even if damage ensues[.]" Hassabo Decl. ¶ 60.

1) Mr. Idris Misstates the Substance of CTA Section 28

69. Mr. Idris mischaracterizes Section 28 by stating that it requires both "acting in accordance with the law," and "not causing damages to others and their properties." Idris ¶ 126. This second purported requirement does not exist in Section 28 and, indeed, contradicts the statute's very purpose. Section 28 explicitly contemplates that damages may result from lawful acts, and has the express purpose of insulating a defendant from such damages if the defendant acted in accordance with Sudanese law. Hassabo Decl. ¶ 60. Mr. Idris's characterization of Section 28 not only ignores this central element, *see* Idris ¶ 126, but in fact contradicts his own earlier discussion of the provision. *See* Idris ¶ 107 (citing Section 28's general rule that "[l]awful exercise negates liability; thus whoever lawfully exercises his right shall not be liable even when damage ensues from that exercise").

2) Section 28 Does Not Require That BNPP Be A Registered Sudanese Bank

70. Mr. Idris states that Section 28 does not insulate BNPP from liability because the Regulating Banking Transactions Act, 2004 ("**RBTA**") only applies to Sudanese banks. Idris ¶¶ 111-116. Here he confuses the legality under Sudanese law of BNPP's transactions with Sudanese banks with the RBTA's banking license requirement, both misinterpreting my prior declaration, *see* Hassabo Decl. ¶ 62, and reading a requirement into the statute that is not there.

71. Contrary to Mr. Idris's declaration, I never suggested that BNPP was licensed as a Sudanese bank or branch pursuant to the RBTA. *Compare* Idris ¶ 111-116 *with* Hassabo Decl. ¶ 62. Rather, I indicated that Section 13 of the RBTA entitles banks to engage in financial transactions, and thus was clarifying that BNPP's Sudanese counterparties were not acting in violation of Sudanese banking law. *See* Hassabo Decl. ¶ 62 ("Article 28 protects BNPP from any liability based on later conduct by the recipients of financial services that BNPP lawfully provided.") (emphasis added).

72. Once a bank is licensed pursuant to the RBTA—which BNPP's Sudanese counterparties were—then it is permitted to conduct business with foreign banks such as BNPP. As I stated in my first declaration, such transactions are presumptively lawful unless they violate the Anti-Money Laundering and Combating Terrorism Act of 2014

("**AMLCTA**"). As the transactions at issue here did not violate the AMLCTA—and Mr. Idris offers nothing to suggest they did—they are valid under Sudanese law.[13]

3) BNPP's Conduct Does Not Fall Under Any Exceptions To Section 28

73. As I described in my first declaration, the "exceptions" to Section 28 immunity are contained in Section 29 of the CTA. *See* Hassabo Decl. ¶ 63; Idris ¶ 117. Mr. Idris does not dispute that Section 29's first three exceptions do not apply, but he suggests—without citation—that BNPP meets the fourth exception. Idris ¶ 124. This suggestion is wrong. Mr. Idris argues that, because Sudanese banks were otherwise affected by the U.S. sanctions, BNPP's activity "exceed[ed] custom and usage." *Id.* This argument—that BNPP somehow violated the law by conducting a larger number of lawful (under Sudanese law) financial transactions than other banks—makes no sense and is not supported by any authority. Likewise, as I stated in my first declaration, there is no precedent or jurisprudence in Sudan suggesting "customs" that restrict the provision of such financial services. Hassabo Decl. ¶ 72.

74. For the same reason, Mr. Idris's argument that Section 5(x) of the CTA permits imposing liability on BNPP must fail. *See* Idris ¶ 109. This provision only applies where a defendant has been found to have violated Sudanese law. *Id.* at ¶ 110. Mr. Idris identifies no such finding against BNPP. Mr. Idris's extended discussion of the licensing requirements of the RBTA is irrelevant, as neither Sudanese law nor my prior declaration contemplates the need for any such license to render the financial transactions at issue here lawful. *See id.* at ¶ 111-116.

4) BNPP's Violations Of U.S. Law Do Not Create Liability Under Sudanese Law

75. Mr. Idris claims that BNPP's conduct as described in BNP Paribas's guilty pleas to U.S. federal and New York State criminal charges and its related civil settlements with federal and New York State authorities also render it liable in Sudan. *See* Idris ¶¶ 119-120. However, the bank's admissions concerning its violations of U.S. sanctions or falsifying business records in the United States have no impact on the legality of its actions under Sudanese law, notwithstanding Mr. Idris's invocation of Sudanese criminal provisions covering falsification of records. *See* Idris ¶ 120. Mr. Idris cites to no authority for the proposition that BNP Paribas may be criminally liable in Sudan. *see* Idris ¶¶ 118-119, because he cannot—its conduct as described in its guilty pleas and civil settlements would not constitute a crime under Sudanese law. Section 122 of the Criminal Act 1991 reads as follows:

> *He who, with fraudulent intention, creates or imitates or conceals or partially destroys or makes a material change in a document with the intention of using it to produce a legal effect commits the crime of forgery.*

The term "fraudulent intention" is defined in Section 3 of the Criminal Act 1991 as follows:

[13] I also note that the duty to ascertain any violations of the AMLCTA falls on the Sudanese banks. In contrast, BNPP would be under no legal duty under, either Section 28 of the CTA or Section 13 of the RBTA, to determine that any services provided to Sudanese banks from abroad violates Sudanese law.

*A person is said to have done an act fraudulently if he did that act with intention of deceiving others to make, by such fraud, a gain or benefit to himself or to another or to make loss to another.*

76. Obviously, the cornerstone of the crime of falsification of records is the element of "fraudulent intention." If there is no fraudulent intention, there is no crime. Here, in order for BNPP's acts of falsification of records to constitute a crime in Sudan, there would need to be proof of BNPP's intention, in falsifying records, to deceive the GOS, the Sudanese banks involved in the transactions or Plaintiffs. The conduct as described in BNPP's guilty pleas and civil settlements does not include such an intention. Thus, its conduct would not constitute a crime in Sudan. Moreover, Section 6(1)(b) of the Criminal Act 1991 provides that the provisions of the Criminal Act apply only to persons who commit criminal acts "in Sudan. Hence, the two cases Mr. Idris cites, *Neilan Bank Case* and *The Sudanese Gharb Islamic Bank*,[14] are inapposite, since the conduct at issue in those cases was committed in Sudan, *see* Idris ¶¶ 121-22, and those cases did not involve the jurisdictional obstacles posed here. Since BNPP was never charged with, nor admitted to committing any illegal acts in Sudan, Mr. Idris's theory fails.[15]

77. Finally, based on my extensive experience with foreign finance in Sudan, there is an additional means of demonstrating that BNPP's transactions did not violate Sudanese law. The Central Bank of Sudan ("**CBOS**") regulates all such transactions. In order to engage in such transactions, Sudanese banks must submit documentation to CBOS for approval. Approval by CBOS means that the transactions at issue were found not to violate any provisions of Sudanese law.

B. BNPP's U.S. Plea To Falsification of Business Records May Not Form the Basis Of A Tort Claim In Sudan

78. Moreover, the theory of tortious conspiracy Mr. Idris proposes in ¶ 24 is not recognized in Sudan, nor provided for in the CTA. Mr. Idris apparently attempts to mix the criminal features of BNPP's admitted document falsification with a civil theory of tortious liability. Such a theory would, however, be governed exclusively by Sudanese rules of tortious liability, which I have already described. Moreover, the standard of proof of tortious liability is different from that for the falsification of documents. Falsification of documents, under Sudanese law, is a criminal offence. As noted above, the cornerstone of this offence is the actor's fraudulent intention, while, in contrast, in order for a tort plaintiff to classify the falsification of documents as a tortious act under the CTA, he would need to establish a causal link between that falsification and injury to the plaintiff. That link does not appear in the description of BNPP's conduct in its guilty pleas and civil settlements. Furthermore, the document falsification to which BNPP admitted relates to the breaching of American sanctions, which is a matter involving the US Government and BNPP (not the Governments of Sudan or Plaintiffs). As any such falsification by BNPP took place outside Sudan, by a non-Sudanese entity, such acts may not be relied upon by Plaintiffs to state a claim of tort liability in Sudan.

## Part VI – Primary Liability Claims

[14] Mohammed Elamin Ali v. The Sudanese Gharb Islamic Bank, S.L.J.R. 2002, at 162.

[15] The same reasoning applies to Mr. Idris's incorrect assertion that Sudan could exercise criminal jurisdiction over BNPP for the falsification of records under Sections 122 and 123 of the Sudan Criminal Act (1991), as claimed in his report. *See* Idris ¶ 120.

A. Mr. Idris Does Not Provide A Basis For Holding BNPP Liable For Negligence Per Se

79. I stated in my first declaration that Plaintiffs fail to allege a viable claim for negligence per se under Sudanese law because they have not identified a Sudanese statutory source of any duty that BNPP violated. Hassabo Decl. ¶ 74(a).

80. In an attempt to circumvent the fact that Plaintiffs have identified no Sudanese statute that creates a specific duty applicable to BNPP in this case, Mr. Idris argues that a number of different provisions in the CTA create "general" duties of care. Idris ¶ 128. As I described in my first declaration, this is simply incorrect. Hassabo Decl. ¶ 74(a). In Sudan, a duty of care must be defined by a specific statute setting forth the nature and scope of that duty. *Id.* Contrary to Mr. Idris's characterizations, there is no general duty "not to cause damage" that exists without a statute defining the scope of that duty. Idris ¶ 129; *see* Hassabo Decl. ¶ 74(a). Other than Mr. Idris's citation to an assortment of CTA provisions, he cites no law suggesting that any such "general" duties could or would be applied to BNPP. *See* Idris ¶¶ 128-30.

81. Similarly, the Complaint's assertions that BNPP's alleged infractions of U.S. law give rise to a duty of care under Sudanese law is baseless. Because no specific Sudanese law establishes a duty of care for violating U.S. laws, no court in Sudan would recognize plaintiffs' claim for negligence per se. Hassabo Decl. ¶ 74(a).

82. Finally, Mr. Idris puts forth no analysis establishing the other requisite elements of negligence under Sudanese law.

B. There Is No Tort of Civil Conspiracy In Sudan

83. Mr. Idris's claims that BNPP could be held liable for civil conspiracy in Sudan are incorrect for a number of reasons. *See* Idris ¶¶ 135-36. First, there is no independent tort of civil conspiracy under Sudanese law. Second, Mr. Idris cites no legal authority to support his opinion that a Sudanese court would recognize this cause of action, other than a single English common law decision that has no relevance in Sudanese courts. Third, a violation of U.S. sanctions alone cannot form the basis for a claim in Sudan.

84. Contrary to Mr. Idris's claims, Sections 138 and 151 of the CTA do not establish a tort of civil conspiracy. The former establishes the requisites of a tort action under Sudanese law (namely, an act, an injury and causation). *See* Hassabo Decl. ¶ 24. The latter addresses the liability of joint tortfeasors, as discussed in the *Naiyma* case. *See supra* ¶¶ 42, 50-55. For the reasons detailed above, Plaintiffs do not state a claim under Sections 138 and 151 of the CTA.

85. Further, the elements of civil conspiracy that Mr. Idris cites do not arise from Sudanese law at all, but rather are taken from English common law—a fact that Mr. Idris acknowledges. Idris ¶ 135 n.32 (admitting that "the tort of conspiracy has not received much judicial treatment in Sudanese court[.]"). Notably, Mr. Idris fails to cite even a single legal authority showing that Sudanese courts would recognize this type of claim—and, as discussed above, *see supra* Part I, English common law is no longer valid authority in the Sudanese legal system. Certainly, it may not be used to create a cause of action that does not exist elsewhere in Sudanese statute or precedent.

86. In addition, Mr. Idris claims that the conduct described in BNP Paribas's guilty pleas and civil settlements could possibly serve as evidence of such a conspiracy. Idris ¶¶ 132-33. In so doing, Mr. Idris appears to suggest that a violation of U.S. sanctions would be independently actionable in Sudan. Idris ¶ 133. This is incorrect. The fact that a party has violated the laws of the United States would not give rise to a claim under Sudanese law. Nor would these violations fall under the ambit of Sections 122-23 of Sudan Criminal Act of 1991, as Mr. Idris suggests, because that statute requires that the crime takes place in Sudan. Idris ¶ 132; *see also supra* Part V, Idris ¶¶118-127.

C. Mr. Idris Does Not Dispute That Sudanese Law Does Not Recognize Claims For Outrageous Conduct Causing Emotional Distress or Commercial Bad Faith

87. In my previous declaration, I stated that Plaintiffs would have no grounds for their claims of Outrageous Conduct Causing Emotional Distress and Commercial Bad Faith. *See* Hassabo Decl. ¶ 74(b)-(c). Mr. Idris does not dispute this.

D. Mr. Idris Applies The Law Of Unjust Enrichment Incorrectly

88. As I explained in my first declaration, an unjust enrichment claim under Sudanese law requires that the plaintiff demonstrate the transmission of money or property from himself to the defendant without legal grounds for such transmission.[16] Hassabo Decl. ¶ 74(d). To establish a lack of "legal grounds," Section 165 of the CTA requires either: (i) a contract between the plaintiff and the defendant, or (ii) an unlawful act. CTA Section 165. As there was no contract between Plaintiffs and BNPP, nor any transfer of funds from Plaintiffs to BNPP generally, Mr. Idris correctly declines to argue this first ground.

89. He does argue, however, that the conduct described in BNP Paribas's guilty pleas and civil settlements automatically renders any contracts between BNPP and the GOS void as a matter of Sudanese law, and that such a void contract is, by extension, "unlawful." Idris ¶ 139. This is incorrect for several reasons. First, BNPP's violation of U.S. sanctions or New York law has no impact on the validity of its contracts under Sudanese law. *See supra* Part V. Second, by conflating the two grounds of an unjust enrichment claim, Mr. Idris attempts to argue that a void contract itself constitutes an unlawful act. This is not correct. Even if the contracts between BNPP and its Sudanese counterparties were void, that is not what "unlawful" means in this context, nor would it provide a basis for Plaintiffs to recover fees paid by the GOS to BNPP. *See* Hassabo Decl. ¶ 74(d) (quoting Section 165(1)'s examples of "unlawful" conduct: "[T]heft, extortion, robbery, cheating, embezzlement, bribery, smuggling, forgery or gross deceit in manufactured goods[.]"). Regardless, as I have described above, BNPP's and the GOS's contracts were presumptively lawful as a matter of Sudanese law, and Mr. Idris has shown nothing to the contrary. *See supra* Part V.

## Part VII - Mr. Idris's Argument About The Sudanese Constitution

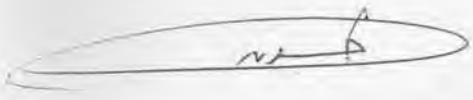
90. In his report, Mr. Idris raises certain issues related to the constitutional authority of the President of Sudan. Idris ¶¶ 140-41. I believe Mr. Idris is referring to my original declaration of October 5, 2016 which addressed Plaintiffs' superseded First Amended Complaint ("Hassabo Initial Decl."). As Plaintiffs' Second Amended Complaint no longer required discussion of these issues, my declaration that I understand is being

[16] Abdulraziq Elsanhouri *Interpretation of New Civil Law (2007 edition)* p. 963-964

submitted to the Court, dated March 19, 2017, does not include what I had previously written concerning the President's constitutional authority. However, I must correct Mr. Idris's description of Sudanese constitutional law.

91. Without drawing any connection between his conclusions and the claims against BNPP, Mr. Idris argues that "[t]he acts of the government of Sudan are … illegal and infringe the plaintiff's [sic] constitutional legal rights." Idris ¶ 141. As support for this argument, he cites once again to *Khartoum Municipal Council*, which is completely irrelevant. In that case, the plaintiffs alleged that the local council had acted negligently and caused them harm. *Id.* This case bears no legal or factual relation to Mr. Idris's claim that the Sudanese national government acted without constitutional authority and deprived Plaintiffs' of their constitutional rights.

92. Notwithstanding the gravity of Plaintiffs' injuries, the acts of the GOS were legal under Sudanese law. Sections 58 and 210 of the Sudanese Constitution invest in the President the authority to declare war and states of emergency, preserve the security of the nation, and restore peace and order. Regardless, the constitutional provisions cited by Mr. Idris bind the GOS, and not private actors such as BNPP.



## Part VIII – Declaration

93. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 6th day of July, 2017

TAYEB HASSABO